

APPEAL NO. 172702
FILED JANUARY 22, 2018

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on October 5, 2017, in (city), Texas, with (hearing officer) presiding as the administrative law judge (ALJ). The ALJ resolved the disputed issues by determining that: (1) the appellant/cross-respondent (self-insured) did not waive the right to contest the compensability of brachial neuritis by not timely contesting the impairment rating (IR) in accordance with 28 TEX. ADMIN. CODE § 130.102(h) (Rule 130.102(h)); (2) the compensable injury of (date of injury), does not extend to brachial neuritis; (3) the Texas Department of Insurance, Division of Workers' Compensation (Division) abused its discretion in denying the self-insured's first Request to Schedule, Reschedule, or Cancel a Benefit Review Conference (BRC) (DWC-45) filed on June 22, 2017; (4) the self-insured did not waive its right to contest the respondent/cross-appellant's (claimant) entitlement to supplemental income benefits (SIBs) for the 12th quarter by failing to timely request a BRC; and (5) the claimant is not entitled to SIBs for the 12th quarter, July 2 through September 30, 2017.

The self-insured appealed the ALJ's determination, requesting review to correct clerical mistakes. The claimant cross-appealed the ALJ's determinations. The self-insured responded, urging affirmance of the ALJ's determinations. The appeal file does not contain a response from the claimant to the self-insured's appeal.

DECISION

Affirmed in part, reformed in part, and reversed and rendered in part.

The parties stipulated, in part, that the claimant sustained a compensable injury on (date of injury); the self-insured (we note the ALJ refers to the self-insured as a carrier throughout the decision) has accepted the compensable injury in the form of a cervical strain and the diagnosis of right-sided C6-7 radiculopathy has been administratively accepted pursuant to Rule 130.102(h); the qualifying period for the 12th quarter of SIBs was from March 20 through June 18, 2017; the self-insured received the Application for [SIBs] (DWC-52) for the 12th quarter of SIBs on June 19, 2017; the self-insured paid the claimant the 11th quarter SIBs; the self-insured submitted a DWC-45 requesting a BRC disputing the claimant's entitlement to SIBs on June 22, 2017; the DWC-45 was denied by the Division on June 28, 2017; and the self-insured filed a second DWC-45 disputing the claimant's entitlement to SIBs for the 12th quarter on July 3, 2017. The evidence established that the claimant was injured during self-defense training.

CLERICAL CORRECTIONS

As noted above the parties stipulated at the CCH that the self-insured has accepted the compensable injury in the form of a cervical strain and the diagnosis of right-sided C6-7 radiculopathy has been administratively accepted pursuant to Rule 130.102(h). However, Finding of Fact No. 1.H. omits “right-sided” from the stipulation. We reform Finding of Fact No. 1.H., in part, to state right-sided C6-7 radiculopathy has been administratively accepted pursuant to Rule 130.102(h) to reflect the stipulation as made by the parties at the CCH.

The decision states that the true corporate name of the self-insured is City of Fort Worth. However, the evidence established that the correct name for the self-insured is Tarrant County. We reform the decision to reflect that the true corporate name of the self-insured is Tarrant County.

WAIVER OF RIGHT TO CONTEST COMPENSABILITY OF BRACHIAL NEURITIS UNDER RULE 130.102(h)

The ALJ’s determination that the self-insured did not waive the right to contest the compensability of brachial neuritis by not timely contesting the IR in accordance with Rule 130.102(h) is supported by sufficient evidence and is affirmed.

EXTENT OF INJURY

The ALJ’s determination that the compensable injury of (date of injury), does not extend to brachial neuritis is supported by sufficient evidence and is affirmed.

ABUSE OF DISCRETION IN DENYING SELF-INSURED’S DWC-45 FILED ON JUNE 22, 2017

The claimant contended that the ALJ erred in adding the issue of whether the Division abused its discretion in denying the self-insured’s first DWC-45 filed on June 22, 2017. We review the ALJ’s ruling to add an issue on an abuse-of-discretion standard, that is, whether the ALJ acted without reference to any guiding rules or principles. Appeals Panel Decision (APD) 031719, decided August 11, 2003, *Morrow v. H.E.B., Inc.*, 714 S.W.2d 297 (Tex.1986). The ALJ correctly noted at the CCH that the BRC report reflects the self-insured’s position, and added the issue at the self-insured’s request and for good cause. The ALJ did not abuse her discretion in adding this issue.

As previously noted the parties stipulated that the self-insured paid the 11th quarter of SIBs, and that it received the claimant’s DWC-52 for the 12th quarter of SIBs on June 19, 2017. It is undisputed that the self-insured had until June 29, 2017, to

request a BRC to dispute the claimant's entitlement to SIBs for the 12th quarter as provided by Rule 130.108(c).

In evidence is a DWC-45 filed with the Division by the self-insured on June 22, 2017. The self-insured indicated that it was disputing entitlement to SIBs, and specified the following:

Inability to work was not direct result of compensable injury, no good faith effort to seek work duringt [sic] qualifying period, and no sufficiently detailed narrative from physician that explains complete inability to work.

Also in evidence is a Commissioner Order dated June 28, 2017, denying the self-insured's request to schedule a BRC because the self-insured failed to indicate what quarter was in dispute and the description of the disputed issue was insufficient to meet the requirements of Rule 141.1(d). The self-insured submitted another DWC-45 on July 3, 2017, with more specific information; however, as noted above the self-insured's deadline to file was June 29, 2017. The self-insured argued at the CCH that the Division abused its discretion in denying its DWC-45 filed on June 22, 2017.

Section 408.147(b) provides as follows:

(b) If an insurance carrier fails to make a request for a [BRC] within 10 days after the date of the expiration of the impairment income benefit period or within 10 days after receipt of the employee's statement, the insurance carrier waives the right to contest entitlement to [SIBs] and the amount of [SIBs] for that period of [SIBs].

Rule 141.1, effective October 1, 2010, provides in part:

(d) Request for [BRC]. A request for a [BRC] shall be made in the form and manner required by the [D]ivision. The request shall:

- (1) identify and describe the disputed issue or issues;
- (2) provide details and supporting documentation of efforts made by the requesting party to resolve the disputed issues, including but not limited to, copies of the notification provided in accordance with subsection (a) of this section, correspondence, e-mails, facsimiles, records of telephone contacts, or summaries of meetings or telephone conversations . . .;
- (3) contain a signature by the requesting party attesting that reasonable efforts have been made to resolve the disputed issue(s) prior to requesting

a [BRC], and that any pertinent information in their possession has been provided to the other parties . . .; and

(4) be sent to the [D]ivision and opposing party or parties.

(e) Complete Request. A request that meets the requirements of subsection (d) of this section is a complete request for a [BRC]. The [D]ivision will schedule a [BRC] if the request is complete and otherwise appropriate for a [BRC].

(f) Incomplete Request. A request for a [BRC] that does not meet the requirements of subsection (d) of this section is an incomplete request and will be denied.

(1) A denied request for a [BRC] does not constitute a dispute proceeding, except as provided by subsection (g) of this section.

(2) The [D]ivision will notify the parties if a request is denied and state the reasons for the denial.

(3) Upon notice from the [D]ivision, the requesting party may submit a new request for a [BRC] that meets the requirements of this section.

(g) Incomplete Request Denials. If a party disagrees with the [D]ivision's determination that the request was incomplete, or, if a party has good cause for failing to meet the requirements of subsection (d) of this section, the party may pursue an administrative appeal of the [D]ivision's determination in accordance with Chapter 142 of this title (relating to Dispute Resolution—[CCH]). The party may also request an expedited [CCH] in accordance with [Rule] 140.3 of this title (relating to Expedited Proceedings).

The self-insured satisfied the criteria of Rule 141.1(g) to pursue an administrative appeal of the Division's denial of the self-insured's DWC-45 filed on June 22, 2017, because the self-insured's position at the August 9, 2017, BRC was that the Division abused its discretion in denying its DWC-45 filed on June 22, 2017, and the self-insured made a motion to add abuse of discretion as an issue at the CCH. See APD 150499-s, decided April 29, 2015.

The ALJ found that the DWC-45 filed by the self-insured on June 22, 2017, satisfied the criteria of Rule 141.1, and determined that the Division abused its discretion in denying the self-insured's DWC-45 filed on June 22, 2017.

An order of an administrative body is presumed to be valid and the burden of producing evidence establishing the invalidity of the administrative action is clearly on the party challenging the action. *Herron v. City of Abilene*, 528 S.W.2d 349 (Tex. Civ. App.-Eastland 1975, writ ref'd).

The evidence established that the Division denied the self-insured's DWC-45 filed on June 22, 2017, because the self-insured failed to indicate what quarter was in dispute and the description of the disputed issue was insufficient to meet the requirements of Rule 141.1(d).

Rule 141.1(d)(1) requires the request for BRC to both identify and describe the disputed issue or issues. The self-insured's DWC-45 in evidence does not state which quarter is in dispute and there was no evidence to establish that any information containing the specific quarter in dispute, such as the claimant's 12th quarter DWC-52, was attached to the DWC-45. Identification of the specific SIBs quarter or quarters being disputed is essential for the Division to determine whether or not it has authority to set the BRC. By not specifying the actual quarter in dispute the self-insured's request does not identify the disputed issue of whether the claimant is entitled to 12th quarter SIBs, and is therefore not a complete request under Rule 141.1(d). The ALJ's finding that the DWC-45 submitted by the self-insured on June 22, 2017, satisfied the criteria of Rule 141.1 is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Accordingly, we reverse the ALJ's determination that the Division abused its discretion in denying the self-insured's first DWC-45 filed on June 22, 2017, and we render a new decision that the Division did not abuse its discretion in denying the self-insured's first DWC-45 filed on June 22, 2017.

WAIVER OF 12TH QUARTER SIBs AND CLAIMANT'S ENTITLEMENT TO 12TH QUARTER SIBs

The evidence established that the self-insured's DWC-45 filed on June 22, 2017, was not a complete request pursuant to Rule 141.1 and that the self-insured did not file another request until after the 10-day deadline. Accordingly, we reverse the ALJ's determination that the self-insured did not waive its right to contest the claimant's entitlement to SIBs for the 12th quarter by failing to timely request a BRC, and we render a new decision that the self-insured waived its right to contest the claimant's entitlement to SIBs for the 12th quarter by failing to timely request a BRC. See APD 111189-s, decided October 3, 2011.

The ALJ determined that the claimant is not entitled to SIBs for the 12th quarter. However, given that we have reversed the ALJ's determination that the self-insured did not waive its right to contest the claimant's entitlement to SIBs for the 12th quarter and have rendered a new decision that the self-insured waived its right to contest the

claimant's entitlement to SIBs for the 12th quarter by failing to timely request a BRC, we reverse the ALJ's determination that the claimant is not entitled to SIBs for the 12th quarter, July 2 through September 30, 2017, and we render a new decision that the claimant is entitled to SIBs for the 12th quarter, July 2 through September 30, 2017.

SUMMARY

We reform Finding of Fact No. 1.H., in part, to state right-sided C6-7 radiculopathy has been administratively accepted pursuant to Rule 130.102(h) to reflect the stipulation as made by the parties at the CCH.

We reform the decision to reflect that the true corporate name of the self-insured is Tarrant County.

We affirm the ALJ's determination that the self-insured did not waive the right to contest the compensability of brachial neuritis by not timely contesting the IR in accordance with Rule 130.102(h).

We affirm the ALJ's determination that the compensable injury of (date of injury), does not extend to brachial neuritis.

We reverse the ALJ's determination that the Division abused its discretion in denying the self-insured's first DWC-45 filed on June 22, 2017, and we render a new decision that the Division did not abuse its discretion in denying the self-insured's first DWC-45 filed on June 22, 2017.

We reverse the ALJ's determination that the self-insured did not waive its right to contest the claimant's entitlement to SIBs for the 12th quarter by failing to timely request a BRC, and we render a new decision that the self-insured waived its right to contest the claimant's entitlement to SIBs for the 12th quarter by failing to timely request a BRC.

We reverse the ALJ's determination that the claimant is not entitled to SIBs for the 12th quarter, July 2 through September 30, 2017, and we render a new decision that the claimant is entitled to SIBs for the 12th quarter, July 2 through September 30, 2017.

The true corporate name of the insurance carrier is **TARRANT COUNTY (a self-insured governmental entity)** and the name and address of its registered agent for service of process is

**COUNTY JUDGE GLEN WHITLEY
100 EAST WEATHERFORD STREET
FORT WORTH, TEXAS 76102.**

Carisa Space-Beam
Appeals Judge

CONCUR:

K. Eugene Kraft
Appeals Judge

Margaret L. Turner
Appeals Judge